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IN THE

Supreme Court of the United States

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No. [redacted]

TERM – 1969

LOUIS A. HEYD, JR., Sheriff
Parish of Orleans
State of Louisiana,

Petitioner,

versus

ROBERT L. BROWN and WILLIAM J. HADRICK,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES

No.

LOUIS A. HEYD, JR., Sheriff
Parish of Orleans
State of Louisiana,
Petitioner,

versus

ROBERT L. BROWN and
WILLIAM J. HADRICK,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPORT OF THE PROCEEDINGS BELOW

Louis A. Heyd, Sheriff, Parish of Orleans, Louisiana v. Robert L. Brown and William J. Hadrick, No. 25848 on the docket of the United States Court of Appeals for the Fifth Circuit, decided January 13, 1969 (unreported).

Brown v. Heyd, 277 F.Supp. 899 (E.D. La. 1967)

JURISDICTIONAL GROUNDS

The Fifth Circuit Court of Appeals handed down its decision in this Habeas Corpus case, affirming the District Court Judgment, on January 13, 1969.

The Fifth Circuit Court of Appeals refused a rehearing in this proceeding on February 6, 1969.

The statutory provisions relied on to confer on this Court jurisdiction to review the judgment in question by writ of certiorari are 28 U.S.C. 1254 and 28 U.S.C. 2101.

QUESTIONS FOR REVIEW

I.

DOES A FEDERAL DISTRICT COURT IN A HABEAS CORPUS PROCEEDING BROUGHT BY A STATE PRISONER HAVE APPELLATE JURISDICTION TO REVERSE A STATE CRIMINAL CONVICTION AND SENTENCE.

II.

DOES A FEDERAL DISTRICT COURT HAVE JURISDICTION TO REVERSE A FINDING OF FACT MADE BY A STATE COURT WITHOUT HOLDING AN EVIDENTIARY HEARING OF ITS OWN.

III.

CAN A FEDERAL DISTRICT COURT GRANT A PETITION FOR HABEAS CORPUS WHEN

THE ERROR COMPLAINED OF IS HARMLESS.

PERTINENT STATUTE

28 U.S.C. 2254 provides:

"(d) In any proceeding instituted in a Federal Court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit —

"(1) that the merits of the factual dispute were not resolved in the State court hearing;

"(2) that the fact finding procedure employed by the State court was not adequate to afford a full and fair hearing;

"(3) that the material facts were not adequately developed at the State court hearing;

"(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

"(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

"(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

"(7) that the applicant was otherwise denied due process of law in the State court proceeding;

"(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal Court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record."

STATEMENT OF THE CASE

On May 26, 1966 Officers Favalora, Lampard and Dupaquier of the Narcotics Squad of the New Orleans Police Department approached 3017-½ Cherry Street, New Orleans, in their unmarked police car with a warrant to search the premises for narcotics. When the officers arrived at this address they saw a Chevrolet about to pull away from the house, and in the vehicle, as driver and passenger respectively, Favalora recognized William Hadrick and Robert Brown, respondents herein, both of whom Favalora knew as narcotics users. T. 22-27. Favalora immediately suspected that Brown and Hadrick had gotten narcotics from the Cherry Street address and so informed his fellow officers. Meanwhile Hadrick and Brown recognized the Vice Squad car and its occupants, and sped off at top speed in their Chevrolet. T. 42, 283. The officers gave chase, sounding their siren. T. 30-31. When they saw Brown put his hand to his mouth and try to swallow something, Lampard fired a shot into the air above the car, then two more shots in rapid succession. T. 278, 285. The Chevrolet stopped suddenly. The officers jumped out of their car, arrested Brown and Hadrick, and pulled them fighting and struggling out of the Chevrolet. T. 55, 279, 28.

On the front seat of the Chevrolet Favalora found a capsule containing heroin. T. 23, 40. Brown and Hadrick and their Chevrolet, which the officers impounded under La. R.S. 40:1001, were then taken to 3017-½ Cherry Street, which residence was searched pursuant to the

warrant which was already in the possession of the police.

Immediately after the arrest, Officers Favalora, Dupaquier and Lampard informed Brown and Hadrick, who were together at this time, that they did not have to say anything if they did not want to, that they had the right to consult with an attorney before talking to the police, that if they could not afford an attorney one would be appointed for them prior to questioning, and that anything they might say could be used in court against them. T. 146, 153, 159, 161, 175, 201, 214, 219. To these admonitions Brown answered, "I know all of that, Mr. Lampard," and proceeded to deny that he and Hadrick knew anything about the heroin capsule and the narcotics outfit which had been found in the car. The only admission which Brown and Hadrick made to the arresting officers at this time was that they were heroin users and had had injections of the drug that day — A STATE OF AFFAIRS WHICH WAS INDEPENDENTLY KNOWN TO THE ARRESTING OFFICERS, WHO INSPECTED RESPONDENTS' ARMS IMMEDIATELY AFTER THE ARREST AND SAW HYPODERMIC NEEDLE MARKS ON BOTH OF BROWN'S ARMS AND ON HADRICK'S LEFT ARM IN THE TELLTALE "TRACK" OF THE ADDICT. T. 241, 243, 246. (It is a routine police procedure to inspect the arms of persons arrested for possession of narcotics. See, *e.g.*, *State v. Robinson*, 221 La. 19, 30, 58 So.2d 408.)

Brown and Hadrick were charged in a bill of information with possession of heroin. T. 10. They entered

pleas of not guilty and went to trial. During the trial in order to show intent, the State of Louisiana sought to introduce into evidence the admission which Brown and Hadrick had made to the arresting officers to the effect that they (the accused) were heroin users and had had an injection of the drug the morning of the arrest. Prior to the introduction of this admission the State of Louisiana laid an elaborate predicate, both out of and in the presence of the jury, to show that the admission was voluntarily and constitutionally made by Brown and Hadrick. See La. R.S. 14:451-452; T. 142-233. Because the instant trial took place after the *Miranda* decision was handed down by this Court, much of the extensive testimony which was given on these predicates concerned the question of whether the accused had been properly warned by the officers under the *Miranda* rules. See T. 143-233. The trial judge concluded that the accused "were amply apprised of their constitutional rights" and permitted Brown and Hadrick's statement to be heard by the jury. T. 88, 232-234.

Brown and Hadrick were found guilty of possession of heroin and were each sentenced to ten years in the Louisiana State Penitentiary. T. 8. They appealed to the Louisiana Supreme Court, urging, among other things, that they had not received adequate *Miranda* warnings from the police. The Louisiana Supreme Court affirmed the convictions and sentences, holding, *inter alia*, that the trial judge acted correctly in allowing the statements at issue to be put into evidence. *State v. Brown*, 250 La. 1125, 1139-1141, 202 So.2d 274.

A few weeks after the Louisiana Supreme Court had affirmed the convictions, while the case was still pending in the Louisiana Supreme Court on Hadrick's Application for Rehearing and both respondents were still in New Orleans in Parish Prison, Brown, who had not asked for a rehearing in the Louisiana Supreme Court, filed a Petition For Writ of Habeas Corpus in the United States District Court in New Orleans, raising the same federal questions which he had argued unsuccessfully in the Louisiana courts, including the contention that he had not been properly warned under *Miranda*. R. vol. I, p. 1. A couple of months later, after the Louisiana Supreme Court had denied his Application for Rehearing, Hadrick filed an identical Petition For Writ of Habeas Corpus in the United States District Court in New Orleans. R. vol. II, p. 1. The two cases were allotted to Judge Alvin B. Rubin and were consolidated for the purpose of trial.

Thereafter, RELYING ON THE TESTIMONY IN THE STATE COURT TRANSCRIPT, AND WITHOUT THE TAKING OF ANY ADDITIONAL EVIDENCE, Judge Rubin reversed the Louisiana Court's finding of fact and held that at the time of their arrest Brown and Hadrick had not been properly warned by the New Orleans Police concerning their right to counsel as required by *Miranda v. Arizona*, 384 U.S. 436; that consequently respondents' admissions to the arresting officers that they were heroin users and had had an injection that very morning should not have been heard by the jury; and that for this reason the Writ of Habeas Corpus would be granted in each case. Thereupon, Judge Rubin set aside respondents' convictions and

sentences and ordered the two men discharged from the custody of the State of Louisiana and of Louis A. Heyd, Jr., Sheriff of Orleans Parish. *Brown v. Heyd,* 277 F.Supp. 899 (E.D. La. 1967).

The State of Louisiana appealed to the Fifth Circuit Court of Appeals, urging four specifications of error in its original and supplemental briefs, certified copies of which briefs are included in the record being sent to this Court with this Petition.

On January 13, 1969 the Fifth Circuit Court of Appeals affirmed the judgment of the Federal District Court in a brief per curiam opinion in which it brushed aside several of Louisiana's contentions of error in a few sentences and *did not even refer to other specifications of error seriously urged by Louisiana on the appeal.* See *Heyd v. Brown,* no. 25848 on the docket of the Fifth Circuit Court of Appeals, decided January 13, 1969; see also briefs filed by Louisiana in that court.

The State of Louisiana is now applying to this Honorable Court for a Writ of Certiorari to review the judgments of the courts below.

ARGUMENT

I.

A FEDERAL DISTRICT COURT IN A HABEAS CORPUS PROCEEDING BROUGHT BY A STATE PRISONER HAS NO APPELLATE JURISDICTION TO REVERSE A STATE CRIMINAL CONVICTION AND SENTENCE

The federal Habeas Corpus law is not a vehicle which a State prisoner can use as a means of obtaining appellate review of a State criminal proceeding, with the Federal District Judge having the power to simply review the evidence adduced at the State trial and reverse the conviction and sentence, as, for example, this Court has the power to do under its supervisory jurisdiction over the State courts in both civil and criminal proceedings.

On the contrary, the characterization of the Writ of Habeas Corpus as an original *civil* remedy for the enforcement of the right to personal liberty rather than as a stage of State criminal proceedings, or as an appeal therefrom, is well known and universally recognized. See *Fay v. Noia,* 372 U.S. 391, at 423-424.

However, in the instant case the Federal District Court exercised what can only be characterized as *appellate* jurisdiction over the Louisiana court proceedings because the Federal District Court Judge merely read the transcript of the Louisiana proceedings and reversed the findings of fact which had been made by the Judge of the Criminal District Court for the Parish of Orleans *on the reading of the transcript alone,* and without the taking of any evidence.

II.

A FEDERAL DISTRICT COURT HAS NO JURISDICTION TO REVERSE A FINDING OF FACT MADE BY A STATE COURT WITHOUT HOLDING AN EVIDENTIARY HEARING OF ITS OWN.

In the instant case the Criminal District Court for the Parish of Orleans held an extensive hearing in order to determine whether Brown and Hadrick had received the *Miranda* warnings prior to being questioned. See T. 144, 148, 154, 158, 167-168, 169-170. At the conclusion of this hearing, at which the three arresting officers and the accused themselves testified, see T. 142-232, the Louisiana trial judge ruled that any statements which may have been made by Brown and Hadrick to the arresting officers were admissible in evidence. T. 232. Thereafter, in a written Per Curiam the trial judge stated that according to the testimony of all the witnesses pertaining to this issue, the accused were amply advised of their rights. T. 88, 112.

On appeal the Louisiana Supreme Court held that the record of the Orleans Parish District Court proceedings supported the finding of the trial judge that the accused had been advised of their constitutional rights. *State v. Brown*, 250 La. 1125, 1139-1141, 202 So.2d 274.

The finding of the Louisiana courts that Brown and Hadrick had been adequately warned under *Miranda* is presumed to be correct under 28 U.S.C. 2254, as this determination is fairly supported by the record. See *Townsend v. Sain*, 273 U.S. 293; Ellis, Criminal Procedure, 45 Texas L.Rev. 592, 595-598 (1967).

Nonetheless, the Federal District Court Judge in the instant case completely ignored this presumption of correctness and reversed the Louisiana court's determination of fact *without even holding an evidentiary hearing de novo.*

Louisiana is of the respectful view that a Federal District Court lacks jurisdiction to reverse a determination of fact made by a State court in accordance with 28 U.S.C. 2254 *unless 1) the State court determination is unreliable in one of the 8 ways specified in 28 U.S.C. 2254; 2) the Federal District Court holds a plenary evidentiary hearing of its own; and 3) the evidence received at the evidentiary hearing in the Federal District Court clearly supports a factual determination contrary to the one made by the State court.* See *Townsend v. Sain,* 372 U.S. 293; *Fay v. Noia,* 372 U.S. 391; *Brown v. Allen,* 344 U.S. 443.

III.

ANY ERROR WHICH OCCURRED WAS HARMLESS

No exact format is required for the *Miranda* warnings. The underlying objective of *Miranda* is to ensure the voluntariness of confessions, not the recitation of a magic formula. See *Tucker v. United States,* 375 F.2d 363 (8th Cir. 1967), cert. denied 389 U.S. 888; *Coyote v. United States,* 380 F.2d 305 (10th Cir. 1967), cert. denied 389 U.S. 992; *Keegan v. United States,* 385 F.2d 260 (9th Cir. 1967); *United States v. Hayes,* 385 F.2d 375 (4th Cir. 1967); *Green v. United States,* 386 F.2d 953 (10th Cir. 1967).

No doubt the warnings given by the police officers to Brown and Hadrick in the instant matter could have been better phrased, but Louisiana believes that the spirit of *Miranda* was fully satisfied even though the precise phraseology set out in that decision was not recited by the officers herein.

Further, Louisiana contends that even if Brown and Hadrick did not receive adequate *Miranda* warnings before making their statement to the police about being drug addicts, that nevertheless the introduction into evidence, during the trial, of respondents' admission that they were drug addicts and had had an injection that morning must be considered as harmless error. See *Chapman v. California,* 386 U.S. 18.

It must be remembered that Brown and Hadrick only told the arresting officers that they were users of heroin and had had an injection of the drug that day; the accused did not admit ownership of either the capsule of heroin or the narcotics paraphernalia found in their car. T. 234.

Brown and Hadrick were charged by the State of Louisiana with unlawful possession of heroin. T. 10. It is settled in the jurisprudence of Louisiana and elsewhere that guilty knowledge, or intent, is an essential ingredient of the crime of possession of narcotic drugs. *State v. Johnson,* 228 La. 318, 82 So.2d 317 (on rehearing); *State v. Maney,* 242 La. 223, 135 So.2d 473; *State v. McIlvaine,* 245 La. 649, 160 So.2d 566, rev'd on other grounds, 379 U.S. 10. Consequently, at the trial of the instant case in order to show guilty knowledge and intent the State of Louisiana introduced evidence of hypodermic needle marks (called "trackmarks") which the officers found on the arms of both Brown and Hadrick at the time of arrest, as well as testimony by Officer Favalora, an expert on narcotics, to the effect that the arms of heroin addicts are always covered with these telltale needle marks, trackmarks on the

arms being a sure sign of a heroin addict. T. 241. (For this reason it is routine procedure for officers arresting a heroin suspect to examine his arms. See *State v. Robinson*, 221 La. 19, 58 So.2d 408; *State v. Allgood*, 254 F.Supp. 916 (E.D. La. 1966).*

In order to further corroborate the evidence concerning the needle marks on the arms of the accused at the time of their arrest, the State of Louisiana at the instant trial also introduced into evidence the statements of the accused here at issue to the effect that they were drug addicts (they "admitted shooting stuff") and had had an injection that morning (they "did up that morning"). T. 234.

Thus the statements of Brown and Hadrick here at issue were merely corroborative of the much stronger proof of addiction which was clearly visible on the arms of the accused themselves. Indeed it is plausible to assume that the accused admitted being drug addicts, while denying ownership of the heroin and the narcotic outfit, because the evidence of their addiction was clearly apparent on their arms. Parenthetically, there can be no doubt that evidence of the needle marks on respondents' arms was admissible in evidence at the trial, as it is settled that the Fifth Amendment privilege against self-incrimination refers only to testimonial compulsion. See *Schmerber v. California*, 384 U.S. 757.

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*Drugs are injected into the veins of the arms, legs, and hand, whereas insulin, in the case of a person suffering from diabetes, is injected into the muscles of the buttocks or hips.

In view of the evidence offered by the State of Louisiana at the trial of this case to show 1) that when arrested Brown and Hadrick had just emerged from the home of a known narcotics addict; 2) that upon recognizing members of the narcotics squad respondents took flight and Brown attempted to swallow something in his hand, a favorite ruse of drug addicts; 3) that a capsule of heroin was found on the seat of respondents' automobile immediately following their arrest; and 4) that at the time of their arrest respondents' arms were covered with hypodermic needle marks in the well-known "trackmark" of the heroin addict, the State of Louisiana submits that the presentation of the statements here at issue to the jury to corroborate the much stronger physical evidence that respondents were addicts cannot reasonably be believed to have contributed to the verdict of guilty of possession of heroin in the instant case. That is, if the admission of these statements is error under *Miranda,* it is a small error that has little, if any, likelihood of having changed the result of the trial. See *Chapman v. California,* supra at 386 U.S. 22; *Fahy v. Connecticut,* 375 U.S. 85; *United States v. Reed,* 392 F.2d 365 (7th Cir. 1968).

REASONS FOR GRANTING THE WRIT

Louisiana is of the respectful view that serious and far reaching questions involving comity and the administration of State criminal justice are involved in this case, and that the questions involved herein affect all 50 of the several States.

Crime looms ever larger as our major domestic problem, and State criminal dockets are becoming more congested by leaps and bounds, with the result that the States are finding it increasingly difficult to keep their criminal dockets current.

If the individual Federal District Court Judges throughout the country (there are about a dozen in Louisiana alone) are allowed to reverse a State conviction and sentence for minor technicalities and harmless imperfections such as exist in the instant case (as is occurring more and more every day) State crminal dockets will soon bog down in chaos.

It literally takes months, and sometimes years, of time and effort and a great deal of money, for the State governments to catch and try a criminal — and yet a Federal District Court Judge can *in an hour's hearing* undo all of this work and turn the criminal free, *throwing him back into the State's already overloaded system with an admonition to the State to retry him in 60 days or turn him back into society.*

It is a settled rule of law in all jurisdictions, both civil and criminal, that the finding of the trier of fact who hears and sees the witnesses is entitled to great weight and will not be disturbed on appeal if there is evidence to support it. For example, within the federal system, upon an appeal by a person convicted in a United States District Court, the Court of Appeals must consider the evidence in the light most favorable to the Government. See, e.g., *Cohen v. United States,* 363 F.2d 321 (5th Cir. 1966). However, increasingly in Ha-

beas Corpus suits filed by State prisoners in Federal District Courts *no weight at all* is given to the finding of the State courts.

By its very nature, any system of judicial review must of necessity proceed from a large base to one Supreme Court, in order to ensure uniformity throughout the system. More and more today, however, a single Federal District Court Judge, sitting alone, reverses the highest court of a State according to his individual interpretation of some recent decision of this Court. Such a procedure, if allowed to continue, will wreck our State criminal systems.

CONCLUSION

The State of Louisiana respectfully requests that this Honorable Court issue a Writ of Certiorari in the instant case and set out guidelines to aid the Federal District Courts in Habeas Corpus cases brought by State prisoners. There is no recent decision of this Court setting limits on Federal Habeas Corpus jurisdiction in State cases, as *Rachel* and *Peacock* set limits on removal of State cases to Federal courts. Such a decision is urgently needed.

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CERTIFICATE

I certify that a copy of this Brief has been mailed to:

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APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 25848

LOUIS A. HEYD, JR., Sheriff,
Parish of Orleans, Louisiana,
-Appellant,

versus

ROBERT L. BROWN and
WILLIAM J. HADRICK,
Appellees.

Appeals from the United States District Court for the Eastern District of Louisiana

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(January 13, 1969)

Before BROWN, Chief Judge, THORNBERRY, Circuit Judge, and TAYLOR, District Judge.

PER CURIAM: This appeal arises out of the petitions for habeas corpus filed by two Louisiana prisoners convicted of unlawful possession of heroin. The district court, upon a review of the record of the state court proceedings, found that statements made by petitioners at the time of their arrest and admitted

into evidence over their objections had been made in the absence of proper *Miranda* warnings and, accordingly, set aside the convictions and sentences. The State brings this appeal, renewing allegations made before the district court that proper warnings were given and, alternatively, that the error, if any, was harmless.[1] For the reasons set forth in the opinion by Judge Rubin, we reject these two contentions. See *Brown v. Heyd,* E.D. La. 1967, 277 F.Supp. 899.

The State advances for the first time in this Court the further contention that the district judge was required to conduct an evidentiary hearing and determine de novo the adequacy of the warnings given petitioners before reversing the contrary factual determinations by the Louisiana courts. In other words, appellant argues that the federal court is without power to reverse fact findings of the state court unless it conducts a hearing of its own. Although the federal district courts are vested with broad power on habeas to conduct evidentiary hearings, we cannot agree that it becomes the duty of the court to exercise that power where, as here, the state trial court has afforded the applicants a full and fair evidentiary hearing. *Townsend v. Sain,* 1963, 372 U.S. 293, 312, 83 S.Ct. 745, 757, 9 L.Ed.2d 770.

Nor can we agree that the presumption of correctness confered upon the state court's factual determination by 28 U.S.C. § 2254 (d) can be rebutted only in an

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[1]The State argued in the court below that petitioners had failed to exhaust state remedies but does not seriously urge this point on appeal.

evidentiary hearing in the federal court. The statute provides that the district court may disregard the state court's findings of fact where the record of the state proceedings is produced and the federal court "*on a consideration of such part of the record as a whole* concludes that such factual determination is not fairly supported by the record." 28 U.S.C. § 2254 (d)(8). (Emphasis added) Inasmuch as the federal district judge was not called upon to resolve conflicts in the testimony,[2] weigh the evience, or make determinations of credibility, he was within his power in making his findings on consideration of the state court transcript.

Appellee Brown has requested this Court to enlarge the judgment of the district court, which allowed the State to retain custody of petitioners for retrial, by ordering his immediate release. This is a matter vested within the discretion of the district judge and we find no basis for overturning his determination in this instance.

The judgment of the district court is in all respects AFFIRMED.

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[2]We find no conflict in the testimony of the three arresting officers regarding the adequacy of the warnings. None of the officers testified that he personally gave the proper warning. Although Dupaquier testified that Lampard warned petitioners and Lampard, contradicting Dupaquier, testified that Favalora had warned them, this testimony was quite vague and general, and, accordingly, posed no conflict with the specific testimony of each of the officers indicating that he had not adequately warned petitioners of their rights under *Miranda v. Arizona*.

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RESPONSE TO PETITIONER'S WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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RESPONSE TO PETITIONER'S WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

STATEMENT OF FACTS

On May 26th, 1966, at approximately 2:45 p.m., Officers Justine Favalora, Kenneth Dupaquier and Patrick Lampard, veteran and knowledgeable members of the New Orleans Police Department assigned to the Narcotics Squad, accompanied by Willie Richardson, a known addict, who resided at 3017 1/2 Cherry Street, New Orleans, Louisiana, were enroute to Richardson's home armed with a search warrant to search the hereinabove mentioned residence.

When the Officers' unmarked vehicle was almost in front of the house they noticed an individual named

Robert L. Brown get into an automobile parked in front of 3017 1/2 Cherry Street.

At this time Officer Favalora states (T 285), "There's Brown — that looks like a deal", whereupon Officer Favalora speeds up and the car being driven by Hadrick speeds off.

There is a short chase in which three shots are fired by Officer Lampard. Hadrick, within a block of the origin of the alleged chase, stops his automobile abruptly.

Officer Favalora runs to Hadrick's side of the automobile and forcefully removes him from behind the wheel.

Officer Lampard runs to the side where Brown is seated, and with considerable force removes him from the automobile. A scuffle erupts and Officer Dupaquier assists Officer Lampard in arresting Brown.

At this time Officer Favalora makes the statement, (T 181), "I have it", referring to his finding a lone capsule laying on forward portion of the front seat.

Officer Dupaquier then proceeds to look on the floor board and under the front seat and finds a piece of cellophane. (T 263).

The defendants then are brought to the residence 3017 1/2 Cherry Street, which consisted of three small rooms, and are interrogated.

While the defendants are in the house, the police further search the automobile, once again they look under the front seat, and this time they find a brown bag containing two glass eyedroppers with yellow bulbs attached, one plastic medicine dropper, one bottle cap and one needle holder.

A Motion to Suppress was filed on behalf of the defendants, and the Court upheld the motion as to all evidence except the "clear capsule" containing a white powder, the one found on the front forward sloping seat after the abrupt stop.

ISSUE

The issue presented to this Court on behalf of Hadrick is whether or not he was *intelligently* and *properly* advised of his rights to counsel by these knowledgeable police at the time of his arrest.

The State in its brief on Page 2 implicitly states that the defendants were properly informed of their rights to counsel. They state: "Immediately after arrest, Officers Favalora, Dupaquier, and Lampard informed Brown and Hadrick, who were together at this time, that they did not have to say anything if they did not want to, that they had a right to consult with an attorney before talking to the police, that if they could not afford an attorney, one would be appointed for them prior to any questioning, and that anything they might say could be used in Court against them." (T 146, 153, 159, 161, 175, 201, 214, 219.)

The Honorable Judge Rubin as well as counsel for Defendant Hadrick was not able to find these quotes in the record where the defendant, Hadrick, was warned that he had the right to an attorney in *advance of interrogation*, and if he could not afford one, the Court would appoint one to represent him *prior to being questioned*. The only officer who states the contentions of the State is Officer Dupaquier. However, he erroneously states that it was Sgt. Lampard who informed the defendants of their rights. When Sgt. Lampard took the stand, he testified he did not inform the defendants of this right. (T 178). He testified that it was Officer Favalora who informed them. Counsel for defendant Hadrick asked Sgt. Lampard the following: (T 176).

"Q. It was never explained to them that you know of your own knowledge that they were entitled to have an attorney right then and there present with them, was it?"

"A. By Favolora, No, sir."

The following questions and answers were propounded to Officer Favalora: (T 200).

"Q. Did you tell him he had that right to counsel even though he didn't have the funds to hire him?"

"A. No."

"Q. Did you afford him any opportunity to procure a lawyer?"

"A. No, sir, I did not."

"Q. And your statement to them was that they had a right to counsel?"
"A. Right."
"Q. You didn't explain what that meant any further than that, did you?"
"A. No, sir. That's all I told them."
"Q. Did you tell them they had a right to have an attorney present when you questioned them?"
"A. No, sir, I did not."

There is not one scintilla of evidence that the defendant Hadrick was ever told that he had the right to consult with an attorney prior to being questioned and if he could not afford one, the Court would appoint one to represent him *prior to interrogation.*

The United States Supreme Court in Miranda case reiterated what it stated in the *Carnly v. Cochran, 369, U. S. 506, 516 (1962).*

> "Presuming waiver from a silent record is impossible. The record must show or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandably rejected the offer. Anything less is not a waiver."

It is important to point out to the Court that although the record does not disclose that the defendant Hadrick was an indigent and the Court had to appoint an attorney for him, the real fact is that I represented the defendant because I knew his father who was, and still

is, a shoeshine man at Loyola University. Counsel's remuneration has been extremely small considering the effort exerted. Actually, this is no matter for concern in this case, and counsel only brings it up because the District Attorney referred to it on Page 11 of her brief to the Louisiana Supreme Court.

Miranda makes no distinction when it comes to the affluence of the defendant. It defines basic rights. These rights must be explained to a defendant in a manner that he understands. This explanation should be different, depending on the intelligence of the accused. The question here is simply, was Hadrick properly advised. Judge Rubin thought not. He was correct.

The defendant, Hadrick, testified that he had a ninth grade education, so in light of the Miranda decision, it was imperative that, because of the defendant's limited education, he be intelligently explained his constitutional rights against self incrimination.

The United States Supreme Court in Miranda on Page 423 stated:

> "In order fully to apprise a person interrogated of the extent of his rights under this system then it is necessary to warn him not only that he has the right to consult with an attorney, but also that if he is indigent, a lawyer will be appointed to represent him. Without this additional warning, the admonition of the right to consult with Counsel would often be

> understood as meaning only that he can consult with a lawyer if he has one or has the funds to obtain one. The warning of a right to counsel would be hollow if not couched in terms that would convey to the indigent — the person most often subjected to interrogation — the knowledge that he too has a right to have counsel present."

Although the State contended that the defendant Hadrick was properly informed of his right to counsel prior to interrogation, and if he could not afford one, the Court would appoint an attorney to represent him prior to questioning on Page 14 of its brief, they contend, and I quote:

> "The fact that the officers did not in so many words also tell Brown and Hadrick that they could have an attorney present during interrogation is immaterial in the respectful opinion of the State of Louisiana, as the right to the presence of an attorney during interrogation is implicit in, and flows naturally from, the right to be represented by and consult with an attorney prior to being questioned."

The above language may imply the necessary ingredients to comply with the Miranda decision to counsel for defendant. It certainly does not to a Negro with a ninth grade education, who is an indigent and cannot understand the circumstances and environment of the place where the arrest took place nor realize that he has the right to an attorney, and if

he cannot afford one, the Court will appoint one prior to his being questioned.

Officer Favalora testifies that Hadrick was a known addict, yet he had only one arrest and that was a municipal charge of throwing a garbage can cover at a school bus. The defendant, Hadrick, is exactly the type of individual who must be afforded the full protection of the law. He is not a known felon or convicted criminal.

The State in its brief contends that, in the alternative, if Hadrick did not receive the proper instructions before making his statement, it was harmless error. The defense contends it was not harmless error but was a major link in the chain of evidence produced by the State to show guilty knowledge and intent to possess a narcotic. Without the alleged admission of the defendant, Hadrick, there is no testimony showing that the defendant had taken narcotics on the day of his arrest.

Furthermore, the State in its opening statement remarked: (T-125).

> "The State will further offer, introduce and file in evidence, one large manila evidence envelope . . . . two pieces of clear cellophane, two glass eyedroppers with yellow bulbs attached, one plastic medicine dropper, one bottle cap, one needle holder and one brown paper bag."

The Court, prior to the date of trial, heard defendant's Motion to Suppress All the Evidence. The Court sustained this motion to all the evidence except to the clear capsule containing the white powder. The Assistant District Attorney who represented the State at the hearing on the motion to suppress was also the same Assistant who referred to above evidence in his opening statement. He was well aware that this evidence was not admissible, however, he refers to this inadmissible evidence and stated that he would introduce it into evidence. On opening the evidence envelope to produce that which the Court ruled admissible, the State laid before the jury all of the implements in the bag. Some items were testified to be those used to inject drugs. The obvious intent was to convey to the jury the intent to possess the drug. Naturally, the jury had to conclude that on the basis of what they saw, not evidence, mind you, that Hadrick had a reason to be in possession of the pill on the front seat.

Counsel for the defense realized that this was a highly prejudicial statement which would prevent the defendant from obtaining a fair and impartial trial and moved for a mistrial. The Court overruled the motion.

In *State vs. Sercovich, 246 La. 503, 165, So.2d 301*, the organ of the Court, Justice Summers stated at Page 305:

> "The defendant's objection to the opening statement as a whole and the particular objections to the quoted portions were overruled

by the trial judge, who instructed the jury not to consider the opening statement as proving anything and to consider only the evidence and the testimony of sworn witnesses who appeared on the stand."

The ruling in the above was that the instruction by the Court at the time the objection was made was timely, however, in the present case, the Court did not instruct the jury until the case was completed. The instructions did not cover the fact of the prejudicial reference to evidence that was not introduced but was clearly exhibited to the jury. A witness testified as to the use this evidence is put to by a narcotics user. Obviously, the jurors had only to put two and two together to come up with an answer highly prejudicial to a defendant charged and convicted with possession of one capsule of heroin.

The case of *State v. Crittenden, 218 La. 333, 49 So2d, 418* the District Attorney in his opening statement to the jury related that he was going to introduce a purported confession, whereupon the defense objected for the reason that the Supreme Court had ruled the confession inadmissible. The Court referred on Page 421 to the per curiam of the trial judge that it was proper for the District Attorney to outline in his opening statement what he expected to prove that when he sought to introduce testimony relating to the statement complained of, he ruled that it should be excluded. He also instructed the jury to disregard any remarks that may have been made by the District Attorney, as far

as they were inconsistent with the evidence that had been introduced.

In the case before this Court the Assistant District Attorney tried to introduce part of the suppressed evidence and the Court on its own motion interrupted the Assistant District Attorney and stated that he had already ruled on that evidence and that it was inadmissible. (T-132).

However, when the State called its first witness, Mr. John Koch, he opened one certain envelope over the objection of counsel and laid out the items in full view of the jury. These items all of which, except the clear capsule, had been previously ruled inadmissible, remained in full view of the jury all during the testimony of Mr. Koch.

Then again at (T-241) over the objection of counsel, Officer Favalora is qualified as an expert in the field of narcotics. Officer Favalora then proceeds to tell how an individual and more particularly an addict uses heroin. In this narrative he refers to all the items which the Assistant District Attorney referred to in his opening statement and which were subsequently laid out before the jury.

Officer Favalora further testified that he examined Hadrick's arm and it displayed telltale track marks typically found on drug addicts. However, there is not one scintilla of evidence that these track marks were from the recent use of a narcotic or from a narcotic at all.

Therefore, the admission of the defendant, Hadrick, as to using the heroin on the day of the arrest becomes one of the essential elements in proving the guilty knowledge and intent to possess a narcotic. Its admissibility becomes a material factor in the conviction and is not harmless error.

The State contends that the lower Court was in error and that it did not hold a hearing de novo on the issues of fact raised by the application of habeas corpus. Actually, this contention is completely unsound and is contrary to the very cases that they cite in an attempt to support this position. In the case Townsend v. Sain, 372 U. S. 312, 83 Supreme Court 745 the following cited at Page 760:

> "A District Court sitting in habeas corpus clearly has the power to compel production of the complete state-court record. Ordinarily, such a record — including the transcript of testimony (or if unavailable some adequate substitute, such as a narrative record), the pleadings, court opinions, and other pertinent documents — is indispensable to determining whether the habeas applicant received a full and fair state-court evidentiary hearing resulting in reliable findings. See United States ex ref. Jennings. Ragen, 358 U. S. 276, 79 S.Ct. 321, 3 L.Ed.2d 296; Townsend v. Sain, 359, U.S. 64, 70 S.Ct. 655, 3 L.Ed.2d 634. Of course, if because no record can be obtained the district judge has no way of determining whether a full and fair hearing which resulted in findings of relevant fact was vouchsafed, he must

hold one. So also, there may be cases in which it is more convenient for the district judge to hold an evidentiary hearing forthwith rather than compel production of the record. It is clear that he has the power to do so."

To hold a hearing de novo on the same facts brought out in the State Court record would be out of the ordinary.

CONCLUSION

In view of the foregoing, it is respectfully submitted that Judge Rubin was correct in granting petitioner the relief they requested. The Writ of Certiorari should be denied.

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CERTIFICATE

I hereby certify that a copy of this Brief has been mailed to Mrs. Louise Korns, Assistant District Attorney for the Parish of Orleans, by addressing same to her at her office, District Attorney's Office, 2700 Tulane Avenue, New Orleans, Louisiana, and depositing in the U. S. Mail, postage prepaid. New Orleans, Louisiana, this day of June, 1969.

PHILIP SCHOEN BROOKS